RECENT DECISIONS.

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ADMIRALTY—JURISDICTION IN REM—VESSEL REQUISITIONED BY FOREIGN NATION.—A privately owned trading vessel sent to this country for a cargo of cereals under requisition by the Italian government, but manned entirely by employees of the owner, was arrested and an action brought *in rem* for damages resulting from a collision. Upon plea of immunity because of the requisition by a foreign state the court *held* that a ship in these circumstances was not entitled to exemption from jurisdiction. *The Attualita* (C. C. A., 4th Cir., #1479. October 6, 1916). See Notes, p. 672.

APPEAL AND ERROR—NECESSITY OF OBJECTION.—The appellate court in a criminal case, on being asked to reverse for errors to which no objection had been made, *held,* one judge dissenting, that an unjust conviction should not be affirmed because a formal objection was not made, when plain error appears in a vital matter. *Lepper* v. *United States* (C. C. A. 4th Cir. 1916) 233 Fed. 227.

Generally, in criminal as well as civil trials, appellate courts will only review questions raised in the lower courts. *Campbell* v. *People* (1884) 109 Ill. 565. Furthermore, it is required that the grounds of the objection be specified except where the error is perfectly patent, when a general objection will suffice. *Thomas* v. *Williamson* (1906) 51 Fla. 332, 40 So. 831; *Rush* v. *French* (1874) 1 Ariz. 99. 25 Pac. 816. This rule aids speedy justice by giving an opportunity for the correction of errors before the close of the trial. See *Rush* v. *French, supra.* In its application, however, difficulties arise which necessitate exceptions, especially in criminal cases, *Gonzales* v. *State* (1895) 35 Tex. Cr. 339, 33 S. W. 363; see *People* v. *Barberi* (1896) 149 N. Y. 256, 43 N. E. 635, and code provisions in the different states provide for various degrees of freedom in the review of such cases. *Edwards* v. *State* (1914) 110 Ark. 590, 163 S. W. 155; *Munroe* v. *State* (1912) 103 Miss. 759, 60 So. 773; *State* v. *Ludwig* (1913) 85 N. J. L. 18, 88 Atl. 822. In general, in civil and criminal law, questions of want of jurisdiction may be raised for the first time on appeal. *State* v. *Swikert* (1913) 65 Ore. 286, 132 Pac. 709. Again, abuse of attorney's privilege may be so flagrant as to warrant a reversal though no objection was made, see *Klink* v. *People* (1891) 16 Colo. 467, 27 Pac. 1062, while if an error is one that could not be obviated through calling attention to it, the necessity for objection disappears. *Chicago etc. R. R.* v. *Kellogg* (1898) 55 Neb. 748, 76 N. W. 462; *Freidrich* v. *Territory* (1891) 2 Wash. 358, 26 Pac. 976; see *Gawn* v. *State* (1896) 13 Oh. C. C. 116. Failure of objection should not prevent a review of a violation of a requirement mandatory upon the trial court, *Clyatt* v. *United States* (1904) 197 U. S. 207, 25 Sup. Ct. 429; *State* v. *Myers* (1894) 8 Wash. 177, 35 Pac. 580, and if the error is perfectly clear, an appellate court may correct it on its own motion. *Bank* v. *Russell* (1911) 124 Tenn. 618, 139 S. W. 734. Negligence of counsel should not waive a clear abuse of judicial discretion. The holding in the instant case and the exceptions to the general rule are all sound as effecting practical justice.

ATTORNEY AND CLIENT—REPRESENTATION OF ADVERSE INTERESTS—RIGHT TO COMPENSATION.—The plaintiff, an attorney, was employed by the defendant to obtain control of a partnership of which defendant was a member, which he did by putting the firm through bankruptcy. In the bankruptcy proceedings, plaintiff also represented the principal creditor of the firm. *Held,* three judges dissenting, plaintiff could recover compensation for services rendered defendant despite the adverse character of the interests of defendant and the creditor. *Eisemann* v. *Hazard* (1916) 218 N. Y. 155, 112 N. E. 722.

Though some courts hold that an attorney may represent adverse interests, where they may be amicably adjusted, *Lawall* v. *Groman* (1897) 180 Pa. St. 532, 37 Atl. 98, the general rule, which cannot be waived even by the express contract of the parties, *In re Boone* (C. C. 1897) 83 Fed. 944, 957; *Strong* v. *International etc. Union* (1898) 82 Ill. App. 426, is that an attorney cannot represent adverse interests even if they do not conflict. *Spinks* v. *Davis* (1856) 32 Miss. 152; *Heffron* v. *Flower* (1889) 35 Ill. App. 200. The test of adversity of interest is whether an attorney's duties to one interest will compel him to assail or neglect the other, *Strong* v. *International etc. Union, supra; Loew* v. *Gillespie* (1915) 90 Misc. 616, 153 N. Y. Supp. 830; 1 Thornton, Attorneys at Law §176, and he cannot represent adverse interests even though he unquestionably acts in good faith, *Peirce* v. *Palmer* (1910) 31 R. I. 432, 77 Atl. 201; see *Miller* v. *Lloyd* (1913) 181 Ill. App. 230, or in different litigations. *In re Boone, supra.* A judgment obtained by an attorney who violates the rule will be set aside if the injured party takes seasonable exception thereto. *Arrington* v. *Arrington* (1895) 116 N. C. 170, 21 S. E. 181; *Seaward* v. *Tasker* (Sup. Ct. 1913) 143 N. Y. Supp. 257. The representation of adverse interests in bad faith is ground for disbarment. *In re Boone, supra; In re Cowdery* (1886) 69 Cal. 32, 10 Pac. 47. Inasmuch as the object of the general rule is not only to prevent the dishonest practitioner from committing fraud, but also to preclude the honest practitioner from putting himself into a position where he may be required to choose between conflicting duties, the decision in the principal case seems erroneous.

BANKRUPTCY—STAYING OF SUITS IN STATE COURTS PENDING APPLICATION FOR A DISCHARGE.—The defendant was adjudicated a bankrupt on his voluntary petition within six years after his former discharge. *Held,* a creditor will not be restrained from proceeding with a suit in a state court though the bankrupt has not applied for a second discharge. *In re Johnson* (D. C., S. D., Ala., 1916) 233 Fed. 841.

Under § 14b of the National Bankruptcy Act of 1898 (30 Stat. 550, Comp. St. 1913 § 9598) as amended in 1903 (32 Stat. 797, Comp. St. 1913 § 9598), a bankrupt cannot be discharged from the payment of his debts if within six years previous he has been discharged in voluntary proceedings, *In re Seaholm* (1 C. C. A. 1905) 136 Fed. 144; see 14 Columbia Law Rev. 257, but that does not bar his right to be adjudicated a bankrupt a second time within that period. *In re Little* (7 C. C. A. 1905) 137 Fed. 521; 2 Remington, Bankruptcy (1st ed.) § 2579; Brandenburg, Bankruptcy (3rd ed.) § 371. Under § 21 of the Bankruptcy Act of 1867 (14 Stat. 526) suits in state courts on provable claims, whether dischargeable or not, were stayed pending the adjudication of the bankrupt's right to a discharge, *In re Rosenberg* (D. C. 1868) Fed. Cas. No. 12054; 20 Fed. Cas. 1194, but under

§ 11a of the Bankruptcy Act of 1898 (30 Stat. 549, Comp. St. 1913 § 9595), a suit in a state court will not be stayed unless it is on a dischargeable claim, *In re Lawrence* (D. C. 1908) 163 Fed. 131; *In re Dowie* (D. C. 1912) 202 Fed. 816, and the determination of the federal courts that a claim is dischargeable is conclusive and binding on the state courts. *Wagner* v. *United States* (6 C. C. A. 1900) 104 Fed. 133. Suits in state courts may be stayed by the federal courts, *In re Basch* (D. C. 1899) 97 Fed. 761, or by state courts when the fact of the pendency of the bankrupt's discharge is properly brought before them. *Hunter* v. *Lissner* (1907) 1 Ga. App. 1, 58 S. E. 54; see *Maas* v. *Kuhn* (1909) 130 App. Div. 68, 114 N. Y. Supp. 444. However, since in the principal case the creditor's suit in the state court in no way interfered with the administration of the assets in the bankruptcy court and since a discharge could not have been granted even if applied for, *In re Seaholm, supra,* the refusal of the stay seems to have been entirely proper and in consonance with the spirit and object of the Bankruptcy Act. See *In re Fed. Biscuit Co.* (2 C. C. A. 1914) 214 Fed. 221; *Cooper* v. *Troy Woolen Co.* (N. Y. 1877) 11 Abb. Pr. (n. s.) 353n.

CARRIERS—LIABILITY FOR BAGGAGE FORWARDED SUBSEQUENTLY TO PASSENGER'S TRANSIT.—The plaintiff took passage with the defendant from Raleigh, N. C., to Henderson, N. C. He delivered his valise to the defendant at Raleigh, but negligently omitted to check it through. The agent at Henderson had it forwarded at the plaintiff's request; when it arived, it had been rifled. *Held,* the plaintiff's negligence relieved the defendant of the duty of carrying the valise, and its liability is only that of a gratuitous bailee. *Perry* v. *Seaboard etc. Ry.* (N. C. 1916) 88 S. E. 156.

A common carrier of passengers is the insurer of their baggage, Elliott, Bailments §293, but this liability arises only by virtue of and incidentally to the duty to transport the passenger. 3 Hutchinson, Carriers (3rd ed.) §1241. Hence the carrier is under no duty to transport his belongings as baggage if the owner does not become a passenger, *Beers* v. *Boston etc. R. R.* (1896) 67 Conn. 417, 34 Atl. 541; *Wood* v. *Maine Cent. R. R.* (1903) 98 Me. 98, 56 Atl. 457; *Marshall* v. *Pontiac etc. R. R.* (1901) 126 Mich. 45, 85 N. W. 242, or if he presents his baggage for transportation subsequently to the completion of his trip. *Wilson* v. *Grand Trunk Ry.* (1868) 56 Me. 60. But in the principal case the carrier's agent, by subsequently undertaking to forward the plaintiff's valise as baggage, bound the company to its original duty and liability as an insurer. *Adger* v. *Blue Ridge Ry.* (1905) 71 S. C. 213, 50 S. E. 783; see *Haas* v. *Louisiana etc. Ry.* (1905) 76 Ark. 607, 89 S. W. 1001; and *cf. Isaacson* v. *New York C. etc. R. R.* (1884) 94 N. Y. 278; *Saunders* v. *Southern Ry.* (6 C. C. A. 1904) 128 Fed. 15; *Lake Shore etc. Ry.* v. *Foster* (1885) 104 Ind. 293, 4 N. E. 20. And even if the agent's act was not binding on the carrier, then the latter was no longer under any obligation to transport the valise as baggage, and hence there was an implied contract for the payment of regular freight rates. *The Elvira Harback* (C. C. 1851) Fed. Cas. No. 4424; *Graffam* v. *Boston etc. R. R.* (1877) 67 Me. 234; see *Wilson* v. *Grand Trunk Ry., supra.* Furthermore, North Carolina (Laws, Pell's Revis. 1908, c. 81, §3749) and many other jurisdictions make it unlawful for a carrier to receive a greater or less compensation from one person than from another for substantially similar services in the transportation of passengers or property;

a fortiori, free services are illegal. *State* v. *Southern Ry.* (1898) 122 N. C. 1052, 30 S. E. 133; *Matter of Boston etc. R. R.* (1891) 5 I. C. C. R. 69. In addition, §3749a of the same law makes it a criminal offense for any shipper or consignee of freight to accept such discriminatory services. Consequently, unless the plaintiff's valise was shipped as an incident of his prior contract of carriage, he is compelled to pay and the defendant to collect the regular tariff for freight, *Texas etc. Ry.* v. *Mugg* (1906) 202 U. S. 242, 26 Sup. Ct. 628; *St. Louis etc. Ry.* v. *Wolf* (1911) 100 Ark. 22, 139 S. W. 536, and hence the carrier is liable as an insurer. Although this theory has never been advanced before any court, it would seem conclusive of the principal case.

CARRIERS—LIMITATION OF LIABILITY—DURESS.—A carrier refused to ship cattle except on a written stipulation as to their condition, which, in effect, limited the carrier's liability. In a suit for damages to the cattle, *held,* the stipulation is voidable because executed under duress. *Missouri, K. & T. Ry.* v. *Pacheco* (Tex. Civ. App. 1916) 185 S. W. 1051.

In England technical duress is limited to cases of actual or threatened bodily violence, *Skeate* v. *Beale* (1840) 11 A. & E. 983; I Shep. Touchstone *61, but money paid under well grounded apprehension of great and unlawful harm to the property of the payor can be recovered in assumsit. *Hills* v. *Street* (1828) 5 Bing. 37; I Page, Contracts § 248; Keener, Quasi Contracts, 426. In the United States, due partly to a more practical view of the actual effects of such influence, and partly to the application of the broader equitable doctrine of undue influence in jurisdictions where legal and equitable actions have been united, duress of property is now generally recognized not only for recovering money paid under such pressure, but also for avoiding a contract made thereunder. *First Nat. Bank* v. *Sargent* (1902) 65 Neb. 594, 91 N. W. 595; Page, Contracts §§ 244, 248. The unjust detention of goods, causing severe hardship, constitutes such duress of property, *Harmony* v. *Bingham* (1854) 12 N. Y. 99; *Harris* v. *Cary* (1911) 112 Va. 362, 71 S. E. 551; *Spaids* v. *Barrett* (1870) 57 Ill. 289, and contracts extorted from the shipper under circumstances similar to those in the principal case are generally deemed void, *St. Louis & S. F. R. R.* v. *Wells* (1907) 81 Ark. 469, 99 S. W. 534; *cf. Jennings* v. *Smith* (1901) 106 Fed. 139, usually because the carrier and shipper do not deal with each other on equal terms and a real choice should be presented to the shipper before he shall be deemed to have voluntarily agreed to a limitation of the carrier's common law liability. *Railway* v. *Cravens* (1892) 57 Ark. 112, 20 S. W. 803; *Parker* v. *Atl. etc. R. R.* (1903) 133 N. C. 335, 45 S. E. 658; *St. Louis & S. F. R. R.* v. *Gorman* (1909) 79 Kan. 643, 100 Pac. 647. It would seem however, that the sounder ground for voiding such contracts is lack of consideration. The carrier being under a legal duty to transport goods without limitation as to liability, a further consideration, such as a lower rate, is necessary for a contract involving such limitation. *Missouri K. & T. Ry.* v. *Carter* (1895) 9 Tex. Civ. App. 677, 29 S. W. 565; *Illinois Cent. R. R.* v. *Ins. Co.* (1901) 79 Miss. 114; 30 So. 43.

CONSTITUTIONAL LAW—LABOR AS PROPERTY RIGHT—INJUNCTIONS.—The plaintiffs, members of a labor union, sought an injunction to restrain a rival labor organization from coercing the plaintiffs into joining the defendants' union by preventing them from working. Mass. Stat. 1914, c. 778 declares that no injunctions shall issue in labor cases except when necessary to prevent irreparable injury to property or

to a property right, for which there is no adequate remedy at law, and that in construing the act, the right to labor shall be considered a personal and not a property right. *Held,* this statute is unconstitutional, since it takes property without due process of law and denies the equal protection of the laws. *Bogni* v. *Perotti* (Mass. 1916) 112 N. E. 853.

That the right to labor is a property right is generally conceded. *Gray* v. *Building Trades Council* (1903) 91 Minn. 171, 97 N. W. 663; *Gillespie* v. *People* (1900) 188 Ill. 176, 58 N. E. 1007. And it is likewise settled that the legislature may not deprive any person of a property right, either directly or indirectly, without due process of law. *Forster* v. *Scott* (1893) 136 N. Y. 577, 32 N. E. 976. No man has a vested right to any particular remedy, but where the abrogation of the remedy destroys the value of the property right which the remedy purports to secure, there is in effect a deprivation of that right. See *Campbell* v. *Holt* (1885) 115 U. S. 620, 6 Sup. Ct. 209; Cooley, Constitutional Limitations (7th ed.) 515. Legislative acts impairing vested rights must be supported by valid considerations of public welfare. Whether the statute considered in the instant case constitutes a reasonable exercise of the police power is questionable. The courts have never doubted that their power to prevent by injunction irreparable injury, for which no remedy exists at law, extends to labor cases. *Allis Chalmers Co.* v. *Reliable Lodge* (1901) 111 Fed. 264; *Goldberg* v. *Stablemen's Union* (1906) 149 Cal. 429, 86 Pac. 806. That the right to labor is property of a peculiar nature and not entitled to injunctive protection, because of the grave abuses possibly arising from such proceedings, may be a valid reason for the propriety of denying the relief in equity. 13 Law Q. Rev. 347. The principal case impliedly answers this contention adversely, but as the grounds on which it bases its conclusion are not specifically stated, the case, while sound in its propositions of law, throws little real light on the constitutionality of the similar provisions of the Clayton Act.

CONTRACTS—IMPOSSIBILITY OF PERFORMANCE—WAR.—The plaintiffs contracted to sell candy to the defendants for export, and deliver it within a reasonable time. On account of the war, the export of confectionery was prohibited by Proclamation; ten or fifteen days later the prohibition was removed. Meanwhile the plaintiffs had canceled the contract. In an action brought by the plaintiffs, the defendants counterclaimed for breach of contract. *Held,* the mere delay was insufficient to permit the plaintiffs to cancel the contract. *Millar & Co.* v. *Taylor & Co.* (Ct. of App.) [1916] 1 K. B. 402.

The defendants contracted to supply the plaintiffs with goods imported from Germany, the defendants having a right to cancel for "contingencies beyond your (their) control". The war made importation from Germany impossible. *Held,* defendants may cancel. *Thaddeus Davids Co.* v. *Hoffman-La Roche Chemical Works* (Sup. Ct., App. Term, 1st Dept., 1916) 160 N. Y. Supp. 973.

The defendants contracted to send a ship to Mariopol and load a cargo for the plaintiffs, "restraints of princes" excepted. Erroneously thinking that the voyage was already illegal, the defendants failed to perform, and claimed on the trial that a reasonable belief that the expected outbreak of war would render such voyage illegal served to excuse them. *Held,* they are not excused. *Mitsui & Co.* v. *Watts, Watts & Co.* (*Ct. of App.* 1916) 115 L. T. R. 248. See Notes, p. 668.

CORPORATIONS—ALIEN ENEMY SHAREHOLDERS—WARTIME STATUS OF THE CORPORATION.—All but one of the shares of a company incorporated in England were owned by German subjects and a German corporation. *Semble,* after the outbreak of the war, such a corporation should be considered as an enemy. *Daimler Co. Ltd.* v. *Continental Tyre and Rubber Co. (Great Britain) Ltd.* [1916] 2 A. C. 307.

An alien enemy, in the absence of license, express or implied, see 16 Columbia Law Rev. 525, cannot sue in the local courts, *Sanderson* v. *Morgan* (1868) 39 N. Y. 231; *Perkins* v. *Rogers* (1871) 35 Ind. 124, and a corporation and an individual stand on the same basis in the eyes of the law. *The Society etc.* v. *Wheeler* (1814) 2 Gall. (U. S. Cir. Ct.) 104. The right to sue, however, revives after peace. *Hanger* v. *Abbott* (1867) 73 U. S. 532. In the United States, a corporation is conclusively presumed to be a citizen of the state which incorporated it for the purpose of giving jurisdiction to the federal courts, *Louisville C. & C. R. R.* v. *Letson* (1844) 43 U. S. 497, but the presumption will not be extended. *St. Louis etc. Ry.* v. *James* (1896) 161 U. S. 545, 16 Sup. Ct. 621. Furthermore, the recent tendency of the courts is decidedly in favor of disregarding the fiction of the corporate entity when the exigency of the case, *Donovan* v. *Purtell* (1905) 216 Ill. 629, 75 N. E. 334, or public policy, *State* v. *Standard Oil Co.* (1892) 49 Oh. St. 137, 30 N. E. 279, requires it. The courts are at variance on the question presented by the principal case. Some decisions regard the nationality of the corporation as that of the country which created it, *Amorduct Mfg. Co.* v. *Defries & Co.* (1914) 31 T. L. R. 69; *Janson* v. *Driefontein Consol. Mines Ltd.* [1902] A. C. 484, while others look back of the corporate entity to the nationality of the stockholders to determine whether or not the corporation must be deemed an alien enemy. See *Society etc.* v. *Wheeler, supra*; *The Tommi* [1914] P. 251, 31 T. L. R. 15. The doctrine of the principal case, in following the latter view, would seem to be in harmony with both the recent tendency of the courts and a sound public policy.

CRIMINAL LAW—INDICTMENT—ALTERNATIVE CHARGES—ELECTION.—Plaintiff in error had been on trial under an indictment charging alternatively in one count that he "sold, offered for sale, kept for sale or otherwise disposed of liquors". Being convicted of "keeping for sale", he contends it was reversible error that the court below allowed the state, over his objection, to introduce evidence of a second liquor sale by him, after proving a first sale by which he claims it made an election to prosecute for that offense of selling alone. *Held,* the state made no such election by the mere introduction of evidence sustaining one or more of the alternative charges, though the defendant might have compelled an election. *Barefield* v. *State* (Ala. App. 1916) 72 So. 293.

At common law an indictment charging two or more distinct offenses in the same court is bad for duplicity. *John Gund Brewing Co.* v. *United States* (8 C. C. A. 1913) 204 Fed. 17; *Commonwealth* v. *Grube* (1910) 20 Pa. Dist. 212. But occasionally it is provided by statute that offenses may be joined in one count, Mo. Rev. Stat. 1909 § 4528, or, as in the statute of the principal case, alternatively therein; Ala. Cr. Code 1907 § 7151; but under the latter type of statute, only one conviction may be had under a count. *Warrick* v. *State* (1913) 8 Ala. App. 391, 62 So. 342. Where an indictment count charges a single offense, some authorities hold that if the state introduces evidence of a specific act, it will constitute an election, and the prosecu-

tion cannot thereafter prove any other act of the kind as a substantial offense on which a conviction may be had. *Moore* v. *State* (1914) 10 Ala. App. 179, 64 So. 520; *State* v. *Hansen* (1912) 40 Utah 418, 122 Pac. 375, while other authorities in such a case admit evidence by the state of more than one act, *State* v. *Stephens* (1897) 70 Mo. App. 554; *Golden* v. *State* (1913) 72 Tex. Cr. 19, 160 S. W. 957, a majority of these then giving the defendant a right to compel an election. *Commonwealth* v. *Coyne* (1910) 207 Mass. 21, 92 N. E. 1028; *Golden* v. *State, supra*; *contra, State* v. *Heinze* (1891) 45 Mo. App. 403. But where by statute, one count contains alternative charges, evidence of more than one act is admissible, the mere proving of a single act not constituting an election. *Moss* v. *State* (1912) 3 Ala. App. 189, 58 So. 62. As the primary purpose of such a statute is to strike down technicalities employed to escape punishment, it seems that this rule, adopted by the principal case, is correct. But the state, after having developed all its evidence, may be compelled to elect between the charges. *Warrick* v. *State, supra*; *Moss* v. *State, supra.*

DIVORCE—ALIMONY—CONSTRUCTIVE SERVICE—PROCEEDING IN REM.—Where petitioner in a suit for divorce asked that alimony be charged against the domestic lands of her husband, described in the petition, and constructive service only was had upon the defendant, *held,* the trial court had jurisdiction to give the relief demanded. *Chapman* v. *Chapman* (Mo. App. 1916) 185 S. W. 221.

In divorce proceedings, the action is generally considered to be *in rem* as to the marital status; *Harding* v. *Allen* (1832) 9 Me. 140; *in personam* as to alimony and costs. *Prosser* v. *Warner* (1875) 47 Vt. 667; *Proctor* v. *Proctor* (1905) 215 Ill. 275, 74 N. E. 145. But where specific property has been brought under the control of the court, whether by attachment, receivership or otherwise the action is *in rem* against the property and no actual service upon the defendant is necessary. *Murray* v. *Murray* (1896) 115 Cal. 266, 47 Pac. 37; *cf. Smith* v. *Smith* (1901) 74 Vt. 20, 51 Atl. 1060. Some jurisdictions consider the alimony as one of the incidents of the marital status, and while admitting that no personal judgment can be obtained upon constructive service, hold that any property of the defendant within the territorial jurisdiction of the court may, by the decree, be charged with the alimony, especially where such property has been described in the petition. *Twing* v. *O'Meara* (1882) 59 Iowa 326, 13 N. W. 321; *Wesner* v. *O'Brien* (1896) 56 Kan. 724, 44 Pac. 1090. The marital status is the relation of the parties to each other and to the community and cannot properly include the property rights of either party which, as in the principal case, exist independently of the marriage relation. *Cf. Garner* v. *Garner* (1880) 56 Md. 127; *Ditson* v. *Ditson* (1856) 4 R. I. 87; *Doerr* v. *Forsythe Adm'x.* (1893) 50 Oh. St. 726, 35 N. E. 1055; 2 Bishop, Marriage, Divorce & Separation § 83. To render judgment *in rem,* the *res* must be before the court, *Cooper* v. *Reynolds* (1870) 77 U. S. 308. Since the lands of the defendant have not been brought under the control of the court as a distinct *res,* and since they cannot properly be included within the marital status, the doctrine of the instant case would seem to depart from sound principles, without securing additional rights to the aggrieved party.

EMPLOYERS' LIABILITY ACT—DAMAGES—PECUNIARY ASSISTANCE.—The father, as administrator, brought an action under the Federal Em-

ployers' Liability Act to recover damages for his adult son's death. The evidence was conflicting as to whether the son ever contributed to the father's support. *Held,* it is not necessary to prove that a decedent has made actual contribution to the support of his parents in order to establish a reasonable expectation of pecuniary benefit from the continuance of his life. *Pittsburg, C., C. & St. L. Ry.* v. *Collard's Adm'r.* (Ky. 1916) 185 S. W. 1108.

American statutes providing for a recovery for death by a wrongful act are modeled on the English Act of 1846, known as Lord Campbell's Act. Under this act substantial damages may be recovered where a reasonable expectation of pecuniary assistance is established. *Franklin* v. *Southeastern Ry.* (1858) 3 Hurl. & N. 211; *Taff Vale Ry.* v. *Jenkins* [1913] A. C. 1. Under similar laws enacted by the states the courts have limited recovery to the pecuniary loss of the plaintiff, but have held a reasonable expectation of pecuniary advantage sufficient to ground a recovery of substantial damages. *Hopper* v. *Denver etc. R. R.* (8 C. C. A. 1907) 155 Fed. 273; *Swift & Co.* v. *Johnson* (8 C. C. A. 1905) 138 Fed. 867. Recent decisions under the Federal Act have allowed a similar recovery. *Dooley* v. *Seaboard etc. Ry.* (1913) 163 N. C. 454, 79 S. E. 970; *Michigan Cent. R. R.* v. *Vreeland* (1913) 227 U. S. 59, 33 Sup. Ct. 192. A pecuniary loss, however, must be clearly established by the beneficiary, or the recovery will be limited to nominal damages. *Garritt* v. *Louisville & N. R. R.* (6 C. C. A. 1912) 197 Fed. 715; *Fordyce* v. *McCants* (1889) 51 Ark. 509, 11 S. W. 694. No damages may be recovered for the loss of society, or for grief, sorrow or injury to feelings. *Michigan Cent. R. R.* v. *Vreeland, supra.* The theory of these acts is not to punish the defendant for negligent destruction of life, but to give the beneficiary what he would probably have received had the deceased lived. *A. T. & S. F. R. R.* v. *Brown* (1881) 26 Kan. 443. It would seem needlessly harsh to limit a parent's recovery to the amount actually contributed by their son to their support, or to allow only nominal damages where no actual assistance was rendered but a reasonable expectation of such assistance was well established.

EVIDENCE—CRIMINAL LAW—CONDUCT OF JUDGE AT TRIAL.—The defendant pleaded not guilty to an indictment for counterfeiting. The court asked the accused whether he had written or procured others to write to the court admitting the accused's guilt and requesting a suspended sentence. The defendant admitted the letters. *Held,* one judge dissenting, the court's interrogation was error but, in view of the overwhelming evidence against the defendant, was not prejudicial and therefore not ground for a reversal. *Lepper* v. *United States* (C. C. A. 4th Cir. 1916) 223 Fed. 227.

The question of the limitations on the rights and powers of a judge during trial is beset with difficulties. A judge may not be a witness in a case over which he presides. See *People* v. *Dohring* (1874) 59 N. Y. 374; *Rogers* v. *State* (1894) 60 Ark. 76, 29 S. W. 849. That he has the right in the interests of truth and justice to interrogate witnesses is generally admitted, *Adler* v. *United States* (5 C. C. A. 1910) 182 Fed. 464; *Epps* v. *Georgia* (1855) 19 Ga. 102, although some courts particularly urge the necessity of extreme caution in the exercise of this right. *Leo* v. *State* (1902) 63 Neb. 723, 89 N. W. 303; *Dunn* v. *People* (1898) 172 Ill. 582; 50 N. E. 137. It has been held that the court should neither interrogate in regard to a subject as yet

untouched, *State* v. *Gauthreaux* (1913) 134 La. 690, 64 So. 680, nor by its questions assume the role of an impeaching witness. *Smith* v. *Commonwealth* (1913) 154 Ky. 613, 157 S. W. 1089. Certainly it is extremely important that the court avoid partiality in putting its questions. *Murphy* v. *State* (1913) 13 Ga. App. 431, 79 S. E. 228; *Leo* v. *State, supra.* Although the weight of authority does not restrict the court to the same rules of evidence as bind counsel in regard to leading questions, *Epps* v. *Georgia, supra*; *Commonwealth* v. *Galavan* (1864) 91 Mass. 271, it is difficult to support this on sound reasoning. *State* v. *Crotts* (1900) 22 Wash. 245, 60 Pac. 403. The entire question resolves itself into determining whether a trial court has abused its discretionary powers, and appellate courts are loath to reverse unless the abuse has been clear. See *Adler* v. *United States, supra.* The appellate court would seem clearly to have been correct in declaring that the questioning in the instant case was erroneous, but is to be commended for refusing to reverse, since such refusal followed the sound modern doctrine that an error must be prejudicial to be ground for reversal. *State* v. *Crawford* (1905) 96 Minn. 95, 104 N. W. 822.

EVIDENCE—CRIMINAL LAW—CONFESSIONS—JOINT DEFENDANTS.—In a trial for arson, the involuntary confession of one defendant implicating the other joint defendant, the present appellant, was admitted to impeach the confessor, and the court charged the jury to disregard it in considering the guilt of the appellant. *Held,* even assuming the confession was admissible as against the confessor, it is prejudicial to the appellant notwithstanding the court's charge, and its admission is therefore reversable error. *People* v. *Buckminster* (Ill. 1916) 113 N. E. 713.

A confession freely made and clearly proven is of the highest value as evidence against the confessor. 1 Wigmore, Evidence § 866; 1 Greenleaf, Evidence (16th ed.) §§ 214, 215; see *Commonwealth* v. *Killion* (1907) 194 Mass. 153, 80 N. E. 222. Being of legitimate probative value such confession is *prima facie* admissible. See 1 Wigmore, Evidence § 10. It is well settled, however, that no declaration of one conspirator made after the crime is committed can be used as evidence against his co-conspirators. *State* v. *Nist* (1911) 66 Wash. 55, 118 Pac. 920; *People* v. *McQuade* (1888) 110 N. Y. 284, 307, 18 N. E. 156. The fact that it would unjustly prejudice the joint defendant would be good ground for excluding it, but this reason fails if there is any other way of conserving the defendant's interests. See 3 Wigmore, Evidence § 1863. The usual method of protecting the joint defendant is to charge the jury to disregard the confession as affecting the guilt of the joint defendant. *Rex* v. *Martin* (1905) 9 Ont. L. R. 218; 2 Br. R. C. 336; *State* v. *Rinehart* (1890) 106 N. C. 787, 11 S. E. 512; *People* v. *Arnold* (1881) 46 Mich. 268, 9 N. W. 406. Obviously, the jury may nevertheless be affected by such evidence, and it would seem that a better remedy is a severance of the trials, as by this means the confession is admitted against the confessor without being before the jury in the case of his co-defendant. *Commonwealth* v. *James* (1866) 99 Mass. 438; Wharton, Criminal Pl. & Pr. (9th ed.) § 310; see *Rex* v. *Martin, supra*; *cf. Davis* v. *People* (1895) 22 Colo. 1, 43 Pac. 122. In general whether such a severance shall be granted upon the defendant's motion is discretionary with the court. Wharton, Criminal Pl. & Pr. (9th ed.) § 309; *United States* v. *Marchant* (1827) 25 U. S. 480; *Emery* v. *State* (1899) 101 Wis. 627, 78 N. W. 145.

HUSBAND AND WIFE—SEPARATE AGREEMENT AS BAR TO SUIT FOR JUDICIAL SEPARATION.—To a suit for judicial separation, instituted by the wife, the husband pleaded in bar a separation agreement, made after the parties had separated. *Held,* though the provisions for separate maintenance are enforcible in such an agreement, it cannot bar a suit for judicial separation. *Landes* v. *Landes* (1916) 94 Misc. 486, 159 N. Y. Supp. 586, aff'd on different grounds, 172 App. Div. 758, 159 N. Y. Supp. 230. See Notes, p. 670.

HUSBAND AND WIFE—SURETYSHIP—MORTGAGE OF WIFE'S SEPARATE ESTATE.—The plaintiff's wife conveyed to him her separate estate and then joined him in a mortgage thereof to secure his debt to the defendant who had knowledge of the original ownership of the wife. In a suit to cancel the said mortgage it was *held* that the transaction as a whole amounted to security by the wife for the debt of the husband, and is void under Alabama Code 1907 § 4497. *Vinegar Bend Lumber Co.* v. *Leftwich* (Ala. 1916) 72 So. 538.

Under enabling statutes abrogating the common law rule of identity, a few states find no difficulty in allowing a wife to secure her husband's debt out of her separate estate, *Goldsmith* v. *Lewine* (1902) 70 Ark. 516, 69 S. W. 308; 1 Brandt, Suretyship & Guaranty (3rd ed.) § 9, but in many states are found express statutes similar to that in the principal case prohibiting a married woman from entering into, or binding her estate by, any contract of suretyship. 1 Brandt, *op. cit.* § 10; *Richardson* v. *Stephens* (1899) 122 Ala. 301, 25 So 39; *Webb* v. *John Hancock Ins. Co.* (1904) 162 Ind. 616, 69 N. E. 1006. The theory of the latter legislation is that the law, while it has removed her disability with regard to ownership and disposition of property, should nevertheless protect the interests of the *feme covert* from being wasted and impaired by assumption, through undue family influence, of debts for the benefit of other persons. See *Richardson* v. *Stephens, supra*; *Third Nat. Bank* v. *Tierney* (1908) 128 Ky. 836, 110 S. W. 293. Accordingly, her suretyship is determined not from the form of the contract, but from ascertaining whether she has received in person or property the benefit of the consideration, *Field* v. *Campbell* (1904) 164 Ind. 389, 393, 72 N. E. 260; *Williams* v. *Hugunin* (1873) 69 Ill. 214, 220; Schouler, Domestic Relations (5th ed.) § 146, and though an estoppel in favor of an innocent third party might in some states under statutory provision forfeit a wife's protection, *Indianapolis Brewing Co.* v. *Behnke* (1907) 41 Ind. App. 288, 81 N. E. 119, and in others even without express provision, *Osborne* v. *Cooper* (1896) 113 Ala. 405, 21 So. 320, yet in general courts have shown themselves astute in examining into the real purpose of transactions tending to evade the statute. *Third Nat. Bank* v. *Tierney, supra*; *Webb* v. *John Hancock Ins. Co., supra.* The instant case, therefore, arising under a statute expressly prohibiting suretyship, seems clearly justified as much in its interpretation of the facts as in its declaration of the law.

INSURANCE—DISAPPEARANCE CLAUSE—VALIDITY.—A certificate holder in a benevolent society agreed that all existing and subsequently passed by-laws should form part of his certificate. A subsequently passed by-law provided that a member's disappearance should not be evidence of death nor create a right to recover until the expiration of the term of his life expectancy. *Held,* the by-law is void as contravening the

statutory presumption of death. *Sovereign Camp of Woodmen of the World* v. *Robinson* (Tex. Civ. App. 1916) 187 S. W. 215.

Generally, contractual stipulations as to the admission or effect of evidence are not favored by the courts. By-laws similar to the one in the instant case are held void since they contravene a statute, *National Union* v. *Sawyer* (1914) 42 D. C. 475, or because they are unreasonable, *Samberg* v. *Knights etc.* (1909) 158 Mich. 568, 123 N. W. 25, or because they tend to impede the court or deprive it of jurisdiction. *Supreme Ruling etc.* v. *Hoskins* (Tex. Civ. App. 1914) 171 S. W. 812; *contra, Kelly* v. *Supreme Council etc.* (1899) 46 App. Div. 79, 61 N. Y. Supp. 394. Yet under other circumstances, courts have allowed companies to stipulate as to the evidence necessary to prove liability. *Moses* v. *Illinois etc. Ass'n.* (1914) 189 Ill. App. 440; *Roeh* v. *Business Men's etc.* (1914) 164 Iowa 199, 145 N. W. 479; *contra, Utter* v. *Travellers' Ins. Co.* (1887) 65 Mich. 545, 32 N. W. 812. It seems difficult when one remembers the character of benevolent societies and the distinction between their purpose and that of insurance companies organized for profit, to understand wherein it is against public policy for such benevolent societies to stipulate that proof of actual death be necessary to create a liability. *Hall* v. *Western Travelers etc.* (1903) 69 Neb. 601, 96 N. W. 170; *McGovern* v. *Brotherhood etc.* (1909) 31 Ch. Cir. Ct. 243. It would seem rather that such contracts, like those waiving the Statute of Limitations, should be held valid as falling within that class of agreements which waive statutes designed wholly for the benefit of the individual. Morever, such a by-law is not invalid as divesting the insured of vested rights. No person has a vested right in the rules of evidence, Cooley, Constitutional Limitations (7th ed.) 524, and the distinction between a by-law abrogating a rule of evidence, and one which by means of such abrogation excepts a risk assumed, see *Supreme Ruling etc.* v. *Hoskins, supra,* would seem insupportable. For it could scarcely be maintained that a right to recover after a disappearance was one of the risks assumed within the concept of the contract as made by the parties.

INSURANCE—FIDELITY BONDS—RENEWALS AS SEPARATE CONTRACTS.—A fidelity bond executed by the defendant indemnified the plaintiff for the period of one year against pecuniary loss sustained through the dishonest acts of its cashier amounting to embezzlement or larceny. After renewal of the bond in its original terms for six successive years by means of continuance certificates, another bond was executed in which the premium was reduced and the scope of liability broadened to include general acts of dishonesty. In a suit to recover for defalcations prior to the execution of the new bond it was *held* that such new bond, considering the changes made, was a separate and distinct contract and not a continuance of the original. *Miners & Merchants Bank* v. *United States Fidelity & Guaranty Co.* (C. C. A. 9th Cir. 1916) 233 Fed. 654.

By the weight of American authority fidelity bonds are regarded as a form of insurance, Richards, Insurance (3rd ed.) § 469; *People* v. *Rose* (1898) 174 Ill. 310, 51 N. E. 246; see *Champion Ice etc. Co.* v. *American Bonding etc. Co.* (1903) 115 Ky. 863, 75 S. W. 197, and are subject to the general rules of interpreation applicable to contracts of insurance. *U. S. Fidelity etc. Co.* v. *First Nat. Bank* (1908) 233 Ill. 475, 84 N. E. 670; *Remington* v. *Fidelity etc.* (1902) 27 Wash. 429, 67 Pac. 989. Renewals of fidelity bonds have been declared by a number of jurisdictions to be separate and distinct contracts, *Alexander Camp-*

bell Milk Co. v. *U. S. Fidelity etc. Co.* (1914) 161 App. Div. 738, 146 N. Y. Supp. 92; *DeJernette* v. *Fidelity etc. Co.* (1896) 98 Ky. 558, 33 S. W. 828; *Green* v. *U. S. Fidelity etc. Co.* (Tenn. 1916) 185 S. W. 726, and this holding logically follows from the conception of successive contracts of insurance as a series of unilateral contracts, each renewal based on its own consideration. *Brady* v. *Northwestern Ins. Co.* (1863) 11 Mich. 425; see *Alexander Campbell Milk Co.* v. *U. S. Fidelity etc. Co., supra.* The court in the instant case bases its decision on a radical change in the terms and consideration in the new bond and clearly is justified in declaring it a separate and distinct contract even where a renewal might ordinarily be regarded as a continuance of the original bond.

INSURANCE—FORFEITURE—CHANGE OF INTEREST—SALE BY TENANT IN COMMON.—Plaintiff and one Blocker were tenants in common of two buildings, and one insurance policy on the same was issued to both, which provided that "if any change takes place in the interest, title, or possession of the subject of insurance, the entire policy shall be void". Blocker sold his interest to a third party, and the building subsequently was burned. *Held,* two judges dissenting, the policy was void only as to one-half the insurance and the plaintiff can recover the other half. *Firemen's Ins. Co.* v. *Larey* (Ark. 1916) 188 S. W. 7.

The clause against alienation is inserted in insurance policies in order to prevent any change in the moral hazard assumed by the company as to the personal character and integrity of the insured. *Malley* v. *Atlantic Ins. Co.* (1883) 51 Conn. 222, 251; *Germania Fire Ins. Co.* v. *Rome Ins. Co.* (1894) 144 N. Y. 195, 39 N. E. 77; Richards, Insurance (3rd ed.) §§ 60, 263. Accordingly, where a new partner is introduced into the personnel of a firm the entire policy is void, because a new moral risk has been imposed upon the insurer; *Germania Fire Ins. Co.* v. *Home Ins. Co., supra; Malley* v. *Atlantic Ins. Co., supra;* Richards, Insurance (3rd ed.) § 263; but where the change of interest occurs between existing partners, the moral hazard has not been affected and the policy is still enforceable. *Hoffman* v. *Aetna Fire Ins. Co.* (1865) 32 N. Y. 405; Richards, Insurance (3rd ed.) § 266. Contracts of insurance have been held by the majority of courts to be divisible where there are several items insured at different amounts, so that a contract, void as to some items, will not be void as to all. *Trabue* v. *Dwelling House Ins. Co.* (1893) 121 Mo. 75, 25 S. W. 848; *Hartford Fire Ins. Co.* v. *Walsh* (1870) 54 Ill. 164; *contra, Thomas* v. *Commercial Union Ass. Co.* (1894) 162 Mass. 29, 37 N. E. 672. But these cases of different items of insurance are not applicable to the principal case where the question involved was the divisiblity of a policy between the parties insured. The policy was given to the two insured jointly and not as a policy to each one to cover the undivided interest of each, and hence it seems that if void as to one party, it will be void as to both. Since an alienation by a tenant in common brings a stranger into control of the whole property, 2 Reeves, Real Property § 686, it would seem that the court erred in not applying the rule as to increased moral hazard, so as to render the policy void as to both tenants.

INTERSTATE COMMERCE—APPLICATION OF STATE LAW TO TRANSPORTATION OF PERSONS TO WHOM THE HEPBURN ACT DOES NOT APPLY.—The plaintiff, a news agent on defendant's train by virtue of a contract made in

Texas between his employers and the defendant company and exempting the defendant from liability for any injury to the plaintiff, was injured while on an interstate trip. If the plaintiff was a passenger the contract of exemption was void as against public policy and he could recover. If he was not a passenger the contract would be a good defense to his action. *Held,* whether the relation of passenger existed is governed by federal law and not by state law, as the contract contemplated interstate transportation. *Nevill* v. *Gulf etc. Ry.* (Tex. Civ. App. 1916) 187 S. W. 388.

Though it is settled law that where Congress has passed legislation upon a matter of interstate commerce such law is supreme, it is equally clear that until Congress does act the states may do so. *Minnesota Rate Cases* (1912) 230 U. S. 352, 33 Sup. Ct. 729; *Adams Express Co.* v. *Croninger* (1912) 226 U. S. 491, 33 Sup. Ct. 148. This is probably subject to the limitation that the state law shall be within the scope of its police power and shall not appreciably hamper interstate commerce. *Smith* v. *Alabama* (1888) 124 U. S. 465, 8 Sup. Ct. 564; *Gladson* v. *Minnesota* (1897) 166 U. S. 427, 17 Sup. Ct. 627. Before Congress forbade any limitation of the liability of an interstate carrier for negligence, 34 Stat. c. 3591, § 7, p. 595, this point was governed by state law, and it is immaterial whether such law is expressed by statute or by decisions of the state courts. *Pennsylvania R. R.* v. *Hughes* (1903) 191 U. S. 477, 24 Sup. Ct. 132; see *Adams Express Co.* v. *Croninger, supra.* The Hepburn Act expressly excepts certain persons from its regulations, including among others news agents, railway postal clerks, and caretakers of live stock. 34 Stat. 584 c. 3591, § 1. Whether a railway postal clerk or a drover is a passenger, and the liability of the carrier for injuries to such clerk or drover, is a question of state law, not of federal law. *Martin* v. *Pittsburg etc. Ry.* (1906) 203 U. S. 284, 27 Sup. Ct. 100; *Southern Pac. Ry.* v. *Schuyler* (1912) 227 U. S. 601, 33 Sup. Ct. 277; *Wiley* v. *Grand Trunk Ry.* (D. C. 1915) 227 Fed. 127. No federal law has defined the status of a news agent on an interstate train, and it would therefore seem to follow that whether the relation of passenger and carrier exists in the principal case and the plaintiff's right to safe carriage as dependent thereon are matters of state law, not of federal law. *Cf. Southern Pac. Ry.* v. *Schuyler, supra*; *Wiley* v. *Grand Trunk Ry., supra.*

JUDGMENTS—OPENING DEFAULT JUDGMENT—STATEMENT BY ADVERSE ATTORNEY.—In an equity suit to reopen a default judgment, the petitioner alleged that he held a release of the plaintiff's claim, but had failed to plead the same or defend the suit because the plaintiff's attorneys had told him that the case would go no further. *Held,* the judgment should be reopened. *Keller* v. *Young* (Tex. Civ. App. 1916) 186 S. W. 405.

A party is not entitled to invoke the aid of equity against a common law judgment when he has an adequate remedy at law, *Dale* v. *Bland* (1910) 93 Ark. 266, 124 S. W. 1026; *Missouri K. & E. Ry.* v. *Hoereth* (1898) 144 Mo. 136, 45 S. W. 1085, or when, having had such a remedy, he neglected to take advantage of it within the time allowed. *Christy* v. *Atchison etc. Ry.* (D. C. 1914) 214 Fed. 1016; *Weed* v. *Hunt* (1908) 81 Vt. 302, 70 Atl. 564. A default judgment will not be opened by equity unless the petitioner can show both a meritorious defense and a loss of that defense either because it was not available to him at law or because he was prevented from setting it up by the fraud or act

of the prevailing party or by a mistake or accident on his own side, unmixed with any fault or negligence on his part. *Peacock* v. *Feaster* (1906) 52 Fla. 565, 42 So. 889; *Valley City Desk Co.* v. *Travelers' Ins. Co.* (1906) 143 Mich. 468, 106 N. W. 1125; *Henley* v. *Chabert* (1914) 189 Ala. 258, 65 So. 993. But a defendant against whom a default is obtained in violation of a compromise agreement on which he relied in not appearing, is not negligent, and equity will enjoin the enforcement of such a judgment as fraudulent. *Gates* v. *Steele* (1890) 58 Conn. 316, 20 Atl. 474; *McGregor* v. *Shaw* (1858) 11 Cal. *47. Furthermore, the defendant's reliance on a statement of the opposite party or attorney that the proceedings are not to continue, is an excuse for a relaxation of diligence on his part, *Beverley* v. *Flesenthall Bros.* (1914) 142 Ga. 834, 83 S. E. 942; *Stodgell* v. *Garnett* (1910) 159 Ill. App. 301, and he need only show, in case the statement is by an adverse attorney, that such attorney had apparent authority to make it. *Texas & P. Ry.* v. *Miller* (Tex. Civ. App. 1914) 171 S. W. 1069. It seems, therefore, that the petitioner in the principal case was entitled to the relief granted.

MINES AND MINERALS—ADVERSE POSSESSION—POSSESSION OF SURFACE.—The Plaintiff's grantor had held adverse possession of the surface for more than the statutory period, but had conveyed the minerals to the plaintiffs within the period, and the plaintiffs had never taken actual possession. *Held,* the plaintiffs had acquired no title, since possession of the surface by one who has conveyed to another the underlying minerals in place does not inure to the latter's benefit, as it is not a possession of the severed mineral interest. *Northcut* v. *Church* (Tenn. 1916) 188 S. W. 220. See Notes, p. 676.

MINES AND MINERALS—OIL AND GAS LEASES—LIABILITY OF ASSIGNEE.—The Defendant, who had secured an assignment from the lessee under an oil and gas lease made by the plaintiff, claimed that the instrument was a conveyance of the oil and gas and that, as a subsequent vendee, he was not bound by the covenant to pay rent, which did not run with the land. *Held,* the instrument was a lease, not a conveyance, and the defendant, as assignee, was bound for the payment of the rent provided for in the original contract. *Pierce Fordyce Oil Ass'n.* v. *Woodrum* (Tex. Civ. App. 1916) 188 S. W. 245. See Notes, p. 676.

PARTNERSHIP—FRAUD—BURDEN OF PROOF.—The defendant, who had sole charge of the partnership, bought the plaintiff's interest. Although the latter had access to a clear set of books, he bought without examining them. *Held,* one judge dissenting, the burden of proof is on the plaintiff to show fraud in the sale. *Aronhime* v. *Levinson* (Va. 1916) 89 S. E. 693.

The general rule is that a person who alleges fraud has the burden of proving it. Kerr, Fraud & Mistake (3rd ed.) 414. In equity, however, relations of trust and confidence are so highly regarded that the burden of proving the honesty of a transaction is transferred to the defendant "who bargains in matter of advantage with a person placing confidence in him". *Gibson* v. *Jeyes* (1801) 6 Ves. *266, *278. It is the presence of confidential relations which creates this extraordinary burden, 1 Story, Equity Juris. (12th ed.) § 311, hence it arises even when the confidence is merely a personal one. 2 Pomeroy, Equity Juris. (3rd ed.) § 956. Thus attorneys are bound to this unusual responsibility,

Denton v. *Donner* (1856) 23 Beav. 285; *Roby* v. *Colehour* (1890) 135 Ill. 300, 25 N. E. 777, as well as trustees. *Coles* v. *Trecothick* (1804) 9 Ves. *234; *Smith* v. *Howlett* (1898) 29 App. Div. 182, 51 N. Y. Supp. 910. Since the relations between partners are fiduciary, *Yost* v. *Critcher* (1911) 112 Va. 870, 72 S. E. 594; *Roby* v. *Colehour, supra*; see *Goldsmith* v. *Eichold* (1891) 94 Ala. 116, 10 So. 80, when one partner, familiar with the partnership affairs, buys the interest of another who has not had the opportunity to become so well informed, the former must prove the honesty and fairness of the transaction. *Brooks* v. *Martin* (1863) 69 U. S. 70; *Platt* v. *Platt* (N. Y. 1873) 2 Thomp & C. 25, 40; *Gilbert* v. *Anderson* (1907) 73 N. J. Eq. 243, 66 Atl. 926. Where, however, both partners had equal opportunity to inform themselves, the weight of authority is with the majority holding of the principal case in putting the burden of proof on the plaintiff who alleges fraud. *Murray* v. *Elston* (1873) 24 N. J. Eq. 310, aff'd (1874) 24 N. J. Eq. 589; *Dorsett* v. *Ormiston* (1898) 25 Misc. 570, 55 N. Y. Supp. 1037. But since even in an ordinary fraud the fact that the plaintiff had access to information does not affect his right to relief, Kerr, Fraud & Mistake (3rd ed.) 415, and since the fiduciary relations between the parties tend further to disarm suspicion, the minority opinion seems preferable, both on principle and because of the modern demand for a high standard of commercial integrity.

PUBLIC SERVICE CORPORATIONS—AUTHORITY OF COURT IN REVIEWING DETERMINATION OF COMMISSION.—N. Y. Consol. Laws (1910) c. 48 § 66 gives the Public Service Commission authority to order gas companies to make such reasonable improvements and extensions as will best promote public interest. Under this statute, the Commission ordered an extension of gas pipes to an outlying district of the city. *Held,* the lower court had no power to annul this decree on the ground that the extension was unreasonable. *People ex rel. N. Y. & Queens Gas Co.* v. *McCall* (1916) 219 N. Y. 84, 113 N. E. 795.

It is well settled that the legislature has the power to regulate public service corporations, 2 Wyman, Public Service Corporations § 1407; *Munn* v. *Illinois* (1876) 94 U. S. 113, and can delegate this power to commissions. Wyman, *op. cit.* § 1408. The uniform rule has been that where the regulations made by the commission are of such a nature as to deprive the corporation of its property without due process of law, *Smyth* v. *Ames* (1898) 169 U. S. 466, 18 Sup. Ct. 418; *Atl. Coast Line* v. *N. C. Corp. Com.* (1906) 206 U. S. 1, 27 Sup. Ct. 585; *Minneapolis Gen. El. Co.* v. *Minneapolis* (C. C. 1911) 194 Fed. 215, or are clearly beyond the statutory power of the commission, *Schuster* v. *Met. Board of Health* (N. Y. 1867) 49 Barb. 450, or, *semble,* induced by fraud or mistake of law, *Sanford* v. *Sanford* (1890) 139 U. S. 642, 11 Sup. Ct. 666; see *Interstate Com. Comm.* v. *Union Pac. R. R.* (1911) 222 U. S. 541, 32 Sup. Ct. 108, such regulations may be declared null by the judiciary. But the courts agree with the principal case in denying themselves the power to pass upon the mere wisdom, expediency, or policy of such regulations as long as they are not confiscatory, illegal or fraudulent. *Interstate Com. Comm.* v. *Ill. Cent. R. R.* (1909) 215 U. S. 452, 30 Sup. Ct. 155; *King* v. *The Mayor* (1832) 3 B. & Ad. 255; see *State* v. *Great Northern Ry.* (1915) 130 Minn. 57, 153 N. W. 247. Since the reasonableness of an order depends not merely upon the pecuniary results to the corporation, as the lower court in the principal case held, *People ex rel. N. Y. & Queens Gas*

Co. v. *McCall* (App. Div. 1916) 157 N. Y. Supp. 707, but also on public convenience, *Atl. Coast Line* v. *N. C. Corp. Comm., supra*; *Wisconsin M. & P. R. R.* v. *Jacobson* (1900) 179 U. S. 287, 21 Sup. Ct. 115, and since it is wholly an administrative function to determine such matters, *State ex rel. R. R. etc. Comm.* v. *Great Northern Ry.* (1913) 123 Minn. 463, 144 N. W. 155; *Interstate Com. Comm.* v. *Ill. Cent. R. R., supra,* the principal case accords with reason and authority in denying the court power to assume administrative functions by substituting its judgment for that of the commission.

REAL PROPERTY—DOCTRINE OF REPRESENTATION—DECREE BINDING CONTINGENT REMAINDERMEN NOT IN ESSE.—In an action for partition and sale of realty, brought by the life tenants because the property was rapidly deteriorating in value, the question was whether a decree for sale would bind the contingent remaindermen not *in esse,* and hence not parties to the suit. *Held,* the interests of those not *in esse* were represented by the parties before the court, and would be bound by a decree of sale, directing that the fund received from the sale be held under the same limitations as those created by the will. *Coquillard* v. *Coquillard* (Ind. App. 1916) 113 N. E. 474, and *Coquillard* v. *Coquillard ibid.* 481. See Notes, p. 674.

RECEIVING STOLEN GOODS—PRESUMPTION OF KNOWLEDGE FROM POSSESSION—REASONABLE NOTICE.—Under an indictment for receiving stolen goods knowing them to be stolen, the court charged: (1) that possession of the stolen goods imputes knowledge that they were stolen unless the defendant explains his possession; (2) that if the circumstances were such as to put a reasonable man upon such reasonable inquiry as would lead to a discovery that they were stolen, then the defendant is chargeable with knowledge. *Held,* both charges were erroneous. *Kasle* v. *United States* (C. C. A. 6th Cir. 1916) 233 Fed. 878.

The very essence of this crime at common law and under statutes is knowledge that the goods were stolen. 2 Bishop, New Criminal Law (8th ed.) § 1138; 2 Wharton, Criminal Law (11th ed.) §§ 1229, 1230. Recent possession of stolen goods under indictments for larceny raises an inference of guilt for the jury which must be rebutted by a satisfactory explanation of the possession. *Keating* v. *People* (1896) 160 Ill. 480, 43 N. E. 724; *Knickerbocker* v. *People* (1870) 43 N. Y. 177; 2 Russell, Crimes (7th ed.) 1308. Likewise, in the crime of receiving stolen goods knowing them to be stolen, recent possession in the accused with proof of a previous larceny are sufficient evidence to go to the jury as a fact from which an inference of guilty knowledge may be drawn; *Regina* v. *Langmead* (1864) 9 Cox C. C. 464; *People* v. *Weldon* (1888) 111 N. Y. 569, 19 N. E. 279; 2 Wharton, Criminal Law (11th ed.) § 1231; but, in no jurisdiction, has it been held that such circumstances form a presumption of guilt which the jury must, as a matter of law, follow unless satisfactorily rebutted. *State* v. *Richmond* (1905) 186 Mo. 71, 84 S. W. 880; *Castleberry* v. *State* (1896) 35 Tex. Cr. 382, 33 S. W. 875. Since the state must prove guilty knowledge as an essential element of the crime, reason as well as authority accord with the principal case in ruling that a bare possession establishes no legal presumption of guilty knowledge which the jury must follow. The majority view is also in accord with the holding that the second charge was reversible error. *Robinson* v. *State* (1882) 84 Ind. 452; *State* v. *Rountree* (1908) 80 S. C. 387, 61 S. E. 1072; *Cohn*

v. *People* (1902) 197 Ill. 482, 64 N. E. 306; *contra, Commonwealth* v. *Finn* (1871) 108 Mass. 466. Though such a charge might well apply to cases of civil liability where the test is negligence and lack of reasonable circumspection, it would seem to be difficult of application to criminal cases, where the test is solely personal criminal knowledge.

TAXATION—RAILROADS—CONCLUSIVENESS OF RETURN.—The railroad listed its taxable property with the auditor as required by charter. The auditor rejected the schedule, and put a higher value on the property. On an appeal afforded by the charter, a commissioner appointed by the court listed the property at twenty-five millions less than the railroad's valuation. It appeared that the railroad had used the wrong method of valuation. *Held,* on the grounds of public policy a taxpayer is bound by his own schedule in the absence of fraud, accident or mistake. *People* v. *Illinois Cent. R. R.* (Ill. 1916) 112 N. E. 700.

There is some diversity of opinion among the courts as to how far the doctrine of estoppel should be applied to a taxpayer who is required to furnish a statement of his property. In a majority of jurisdictions a taxpayer is estopped from questioning the correctness of his own return, in the absence of fraud, accident or mistake, on the theory that the state has acted on this return in levying the tax. *Slimmer* v. *Chickasaw County* (1908) 140 Iowa 448, 118 N. E. 779; *Inland Lumber Co.* v. *Thompson* (1905) 11 Idaho 508, 83 Pac. 933. Where no action has been taken by the state upon the taxpayer's own schedule, it is difficult to find the elements necessary to constitute an estoppel. *City of Charlestown* v. *County Comm'rs.* (1872) 109 Mass. 270. While, on account of the peculiar facts of the principal case the court is clearly correct in refusing to base its decision on the ground of estoppel, yet the case can scarcely be justified on the elastic basis of public policy. The public policy in not allowing a taxpayer to question his own schedule in the absence of fraud, accident or mistake is a pure rule of business administration to enable the state to conduct its finances with facility and certainty. But the purpose of a revenue law is "to take from each of the persons liable the just proportion which he ought to contribute to the public burdens; and it is neither justice nor sound public policy to seize upon advantages—if any should offer—to make one pay more than his just share". *Chicago & N. W. Ry.* v. *Auditor General* (1884) 53 Mich. 79. It is difficult to see how the patent injustice resulting from the decision in the principal case furthers the ends of sound public policy.

TRUSTS—CONSTRUCTION OF TRUST DEED—GIFT TO "WIDOW" GOES TO FIRST WIFE ONLY.—In contemplation of his son's marriage, a father conveyed land for the benefit successively of the son for life, of the son's widow for life, then of the son's children. The *cestui's* first wife predeceased him, leaving three children, and he remarried. *Held,* the children by the first marriage take to the exclusion of the second wife. *In re Solms' Estate* (Pa. 1916) 98 Atl. 596.

It is fundamental to the interpretation of both wills and deeds that the intent of the maker, as discoverable compatibly with other rules of law from the body of the instrument and the circumstances surrounding its execution, shall be carried out. Hawkins, Wills (2nd ed.) 6; 2 Devlin, Deeds (2nd ed.) § 836. A devise to the husband or wife of another, who has a spouse living at the date of the will, is by the great

weight of authority construed to apply to that spouse and no other, *Re Burrow's Trusts* (1864) 10 L. T. R. (n. s.) 184; *Van Brunt* v. *Van Brunt* (1888) 111 N. Y. 178, 19 N. E. 60; *Re Parrott* (1886) 33 Ch. D. 274, because with regard to ascertained beneficiaries, a will speaks as of its date. 1 Jarman, Wills (5th ed.) *302. But where the court finds it was not the intention to devise to a specific wife as an individual person, but to make provision for a surviving spouse *qua* survivor, any wife may take. *Wilmot* v. *DeMill* (Canada 1893) 32 New Brun. 8; *Peppin* v. *Bickford* (1797) 3 Ves. *570; see *In re Coley* [1903] 2 Ch. 102. This is the general rule in insurance policies where the wife is named as beneficiary. *In re Browne's Policy* [1903] 1 Ch. 188; *In re Parker's Policies* [1906] 1 Ch. 526. And on the same ground a gift to the "widow" has a broader application than a gift to the "wife", and includes such wife as may survive the person designated. *Meeker* v. *Draffen* (1911) 201 N. Y. 205, 94 N. E. 626; *Swallow* v. *Swallow's Adm'r.* (1876) 27 N. J. Eq. 278; *contra, Beers* v. *Narramore* (1891) 61 Conn. 13, 22 Atl. 1061; *Anshutz* v. *Miller* (1876) 81 Pa. St. 212. It would seem that the more liberal construction is based on sounder public policy and usually defers more nearly to the real intent of the devisor than the narrow interpretation. Certainly in the principal case the facts pointed strongly to an intention to make provision for any person who filled the status of surviving wife rather than to make a gift to a particular individual, and the holding seems extreme.